No. 85-871

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

ALBERT T. WILLARDO, M.D.,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON APPEAL TO THE COURT OF APPEALS OF INDIANA

MOTION TO DISMISS JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether I.C. §35-37-2-2(6) (Burns Repl. 1985) which requires, among other things, that either a party or his attorney sign requested special instructions, violates the due process clause of the Fourteenth Amendment?

II. Did the trial court err by overruling the Petitioner's objection to trial before a six-person jury which was based upon the assertion that the court's application of I.C. §35-37-1-1 (Burns Repl. 1985) which provides for a six-member jury violated the constitutional protections against *ex post facto* laws?

III. Did the trial court err by denying the Petitioner's motion to dismiss which was based upon the assertion that the indictment was vague and uncertain?

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MOTION TO DISMISS JURISDICTIONAL STATEMENT

Respondent, the State of Indiana, respectfully requests the Court to dismiss the jurisdictional statement which seeks review of an opinion of the Court of Appeals of Indiana since substantial federal questions have not been raised.

OPINION BELOW

The Court of Appeals of Indiana entered an opinion in this cause on March 27, 1985. The opinion is set forth in

Petitioner's Appendix at A-1 and is not officially reported. On May 23, 1985, the Court of Appeals of Indiana denied the Petitioner's petition for rehearing. The unpublished order of the Supreme Court of Indiana denying the Petitioner's petition for transfer was entered on September 17, 1985 (Petitioner's Appendix at A-33).

STATEMENT OF THE CASE RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The Petitioner, Dr. Albert T. Willardo, a former coroner of Lake County, Indiana, was convicted and sentenced for theft due to converting monies issued from county funds for fraudulent mileage claims and depositing the monies into his personal campaign fund.

The Petitioner was indicted on September 3, 1982 for a theft committed in 1978. In 1978, a jury panel of twelve members was authorized. I.C. §35-1-30-1 (1977). However, on September 1, 1982, prior to the indictment, IC §35-37-1-1 (Burns Repl. 1985) became effective and authorized a jury of six qualified jurors to hear the Petitioner's Class D felony theft charge. In this case, a panel of six jurors was assembled. Prior to trial, however, the Petitioner filed a motion for a twelve-member jury which was denied. On appeal to the Court of Appeals of Indiana, the Court concluded that the Petitioner was not denied any substantial right when he was tried by a six-member rather than a twelve-member jury and there was no *ex post facto* prohibition involved (Petitioner's Appendix at A-13-22).

In addition, prior to trial, the Petitioner filed a motion to dismiss the indictment which was based upon the assertion that the indictment failed to state the offense with certainty. The trial court denied the motion. On appeal to the Court of Appeals of Indiana, the Court dismissed the Petitioner's claim and ruled that he failed to specifically state in what manner the indictment was deficient (Petitioner's Appendix at A-31).

Finally, after the presentation of evidence, the Petitioner tendered several final instructions which the trial court refused. On appeal, the Court of Appeals of Indiana declined to address the Petitioner's allegation of error regarding the refusal of the instructions since he failed to comply with I.C. §35-37-2-2(6) (Burns Repl. 1985) which requires that either a party or his attorney must sign the requested instruction(s) (Petitioner's Appendix at A-29-30).

SUMMARY OF THE ARGUMENT

The United States Supreme Court has no jurisdiction to review the Petitioner's argument regarding the constitutionality of I.C. §35-37-2-2(6) (Burns Repl. 1985) which requires, among other things, that either a party or his attorney sign requested special final instructions, since this contention was not raised, briefed, or argued in the Indiana appellate courts.

Further, the Petitioner has failed to present a substantial federal question regarding his claim that the indictment which charged him with theft is vague. A mere reference to the Fifth Amendment to the United States Constitution is insufficient to support a claim that the amendment has been violated.

Finally, the Petitioner's trial by a jury of six persons was not in violation of the constitutional prohibition against *ex post facto* laws even though at the time the theft was committed, the Petitioner had the right to be tried by a jury of twelve. The Petitioner was subjected only to a change in procedure and no *ex post facto* prohibition was involved. Because the jurisdictional statement does not raise substantial federal questions, the statement does not warrant further review.

ARGUMENT

I.

WHERE THE ISSUE AS TO WHETHER I.C. §35-37-2-2(6) (BURNS REPL. 1985) WHICH REQUIRES, AMONG OTHER THINGS, THAT EITHER A PARTY OR HIS ATTORNEY SIGN REQUESTED SPECIAL FINAL INSTRUCTIONS CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS NEITHER SPECIFICALLY RAISED AT TRIAL NOR DECIDED BY INDIANA APPELLATE COURTS, THE ISSUE IS NOT REVIEWABLE BY THE UNITED STATES SUPREME COURT

After the presentation of evidence, the Petitioner tendered several special final instructions which the trial court refused. On appeal, the Court of Appeals of Indiana declined to address the Petitioner's allegation of error regarding the refusal of the instructions since he failed to comply with I.C. §35-37-2-2(6) (Burns Repl. 1985) which reads in pertinent part:

> (6) If the prosecuting attorney, the defendant, or his counsel desires special instructions to be given to the jury, these instructions must be:
>
> (A) reduced to writing;
>
> (B) numbered;
>
> (C) signed by the party, or his attorney, who is requesting the special instructions; and
>
> (D) delivered to the court;
>
> before the commencement of the argument. A charge of the court or any special instructions, when written and given by the court under this subdivision, may not be orally qualified, modified, or in any manner orally explained to the jury by the court.

In his petition for rehearing to the Court of Appeals and in a petition for transfer to the Supreme Court of Indiana,

the Petitioner merely asserted that "Indiana Code §35-37-2-2(6) does not require each special instruction to be signed and, therefore, [the issue was] not waived." The petitions were denied by the appellate courts. In his jurisdictional statement, however, the Petitioner argues that I.C. 35-37-2-2(6) contravenes his rights guaranteed under the due process clause of the Fourteenth Amendment (Jurisdictional Statement, pp. 14-18).

The United States Supreme Court has no jurisdiction to review the Petitioner's current contention since the constitutionality of I.C. §35-37-2-2(6) was not raised, briefed, or argued in the Indiana appellate courts. *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160, 65 S.Ct. 573, 576 (1944). *See also Hill v. California*, 401 U.S. 797, 805-806, 91 S.Ct. 1106, 1111-1112 (1971). Indeed, in *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 1163 (1969), the Supreme Court indicated the desirability of allowing state courts to determine the constitutionality of state statutes in light of a federal constitutional challenge since this not only assures an adequate record, but also gives the states the first opportunity to provide a definitive interpretation of their statutes.

In addition, when the highest state court does not examine an issue, it is presumed that the omission is due to lack of proper presentation unless the aggrieved party can affirmatively show the contrary. *Fuller v. Oregon*, 417 U.S. 40, 50 n.11, 94 S.Ct. 2116, 2123 n.11 (1974) quoting *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969). No such showing has been made in this case. Since the constitutionality of I.C. §35-37-2-2(6) was not raised, briefed, or argued in the Indiana appellate courts, review by the United States Supreme Court is precluded. *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68 (1945).

II.

THE TRIAL COURT DID NOT ERR BY OVERRULING THE PETITIONER'S OBJECTION TO TRIAL BEFORE A SIX-PERSON JURY WHICH WAS BASED UPON THE ASSERTION THAT THE COURT'S APPLICATION OF I.C. § 35-37-1-1 (BURNS REPL. 1985) WHICH PROVIDES FOR A SIX-MEMBER JURY VIOLATED THE CONSTITUTIONAL PROTECTIONS AGAINST EX POST FACTO LAWS

The Petitioner was indicted on September 3, 1982 for a theft committed in 1978. In 1978, I.C. §35-1-30-1 (1977) provided for a twelve-member jury in the trial of Class D felonies. On September 1, 1982, I.C. §35-37-1-1 (Burns Repl. 1985) became effective and authorized six-member juries. Prior to trial, the Petitioner filed a motion for a twelve-member jury which was denied. In his jurisdictional statement, the Petitioner argues that his trial by a jury of six persons was in violation of the constitutional prohibition against *ex post facto* laws, Article 1, §10 of the United States Constitution, because at the time the theft was committed, he had the right to be tried by a jury of twelve (Jurisdictional Statement, pp. 18-24).

An *ex post facto* law is a legislative act relating to criminal matters, retroactive in operation, which alters the situation of an accused to his disadvantage, or deprives him of some lawful protection to which he is entitled. The *ex post facto* prohibition, however, is applicable only where a substantive right is taken away and not where there is merely a change in procedure. *Portley v. Grossman*, 440 U.S. 1311, 100 S.Ct. 714 (1980).

In *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620 (1898), a case relied upon by the Petitioner, the United States Supreme Court ruled that a change in the law by Utah which reduced the number of jurors for a trial subsequent to the offense for which the trial was to be held was

unconstitutional as an *ex post facto* law when the offense had been committed while Utah was a territory and subject only to federal law. The Supreme Court concluded that the new statute "belongs to that class which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage'." *Id.* at 351, 18 S.Ct. at 623. The Supreme Court further stated:

> ...a statute that takes from the accused a *substantial right* given to him by the law in force at the time to which his guilt relates would be ex post facto in its nature and operation, and ... legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure.
>
> *Id.*, at 352, 18 S.Ct. at 623, (Emphasis added).

Later, in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970), the Supreme Court held that a jury of six persons is constitutional but did not overrule *Thompson* on the *ex post facto* issue. *Williams*, however, did not contain the *ex post facto* aspects present in *Thompson*. Therefore, *Thompson* could not have been specifically overruled in *Williams*. Nevertheless, in *Williams*, 399 U.S. at 101, 90 S.Ct. at 1906, the Court stated that "neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members."

Since *Williams* and its progeny, a jury of twelve is no longer considered a constitutional right, is not deemed to offer any advantage to a defendant, and is not substantial. Thus, in the instant case, I.C. §35-37-1-1 which reduced the jury's size from twelve to six did not take away a substantial right, but operated "only in a limited and unsubstantial manner to ... [the Petitioner's] disadvantage." See *Beazell*

v. Ohio, 269 U.S. 167, 46 S.Ct. 68 (1925).[1] The Petitioner was subjected only to a change in procedure and no *ex post facto* prohibition was involved.

III.

SINCE THE PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION REGARDING HIS CLAIM THAT THE INDICTMENT IS VAGUE, REVIEW BY THE UNITED STATES SUPREME COURT IS PRECLUDED

The Petitioner was charged as follows:

> The Grand Jurors of Lake County, in the State of Indiana, good and lawful men, duly and legally impaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of said County of Lake, in the name and by the authority of the State of Indiana, on their oaths present that one ALBERT T. WILLARDO, M.D. of said County, on the January 1, 1978 through December 31, 1978, inclusive, at said County and State aforesaid, did then and there did knowingly or intentionally exert

---

[1] In *Beazell v. Ohio*, 369 U.S. 167, 46 S.Ct. 68 (1925), the Supreme Court considered a change in the law which resulted in joint trials of defendants who would otherwise have been entitled to separate trials. The Court determined that this was not an *ex post facto* violation since "statutory changes in the mode of trial...which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage are not prohibited." *Id.* at 170, 46 S.Ct. at 69. In addition, in *Maxwell v. Dow*, 176 U.S. 581, 605, 20 S.Ct. 448, 472, (1900), the Supreme Court referred to the propriety of an eight-member jury as a procedural matter:

> [T]he state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

> unauthorized control in a manner or to an extent other than that to which the other person has consented over property of Lake County, Indiana, a body politic or corporate, to-wit: money from the Lake County, Indiana, Coroner's Budget (Calendar Year 1978) Account Number 001-070-00213 (Traveling Expenses), with the intent to deprive the said Lake County, Indiana, a body politic or corporate, of the value and use thereof...

Prior to trial, the Petitioner filed a motion to dismiss the indictment which was based upon the assertion that the indictment failed to state the offense with certainty. The trial court denied the motion. On appeal to the Court of Appeals of Indiana, the Petitioner stated (Petitioner's Appendix at A-30):

> While it is true that some latitude should be permitted, in regard to certainty, a child could have done a better job of drafting. No one charged in this fashion could read this and understand what he was charged with. It was obviously hurriedly drawn just before the Special Grand Jury expired, and thereafter the State could not amend the indictment as far as substance. Dr. Willardo timely filed his Motion to Dismiss on those grounds, but it was denied by the Court without comment.

The Court of Appeals, however, dismissed the Petitioner's claim and ruled that he failed to specifically state in what manner the indictment was deficient (Petitioner's Appendix at A-31). In his jurisdictional statement, the Petitioner alleges that the indictment was vague and should have been dismissed (Jurisdictional Statement, pp. 24-25).

An indictment is sufficient if it contains the elements of the offense charged, fairly informs a defendant of the charge against which he must defend, and finally, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United*

States, 418 U.S. 87, 94 S.Ct. 2887 (1974). In his jurisdictional statement, the Petitioner again fails to specify in what manner the indictment is deficient.

Moreover, the Petitioner has not raised a substantial federal question pursuant to 28 U.S.C. §1257. Although the jurisdictional statement contains a mere reference to the Fifth Amendment, this is insufficient to support a claim that the amendment has been violated. Indeed, as stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 684, 17 S.Ct. 709, 711 (1897): "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." Since the Petitioner has failed to raise a substantial federal question regarding his claim that the indictment is vague, review by the United States Supreme Court is precluded.

CONCLUSION

For the foregoing reasons, the Respondent, the State of Indiana, respectfully requests that the jurisdictional statement be dismissed.

Respectfully submitted,

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